Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

SOCIALIST PEOPLE'S LIBYAN ARAB JAMAHIRIYA, *et al.*,
Petitioners,

v.

DENICE H. REIN, *et al.*,
Respondents,

and

UNITED STATES OF AMERICA,
Intervenor.

Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the court of appeals erred in sustaining the constitutionality of an amendment to the Foreign Sovereign Immunities Act that confers subject-matter jurisdiction in damage suits by U.S. nationals for exterritorial torts committed by states that have been designated by the Executive as "state sponsors of terrorism."

2. Whether the court of appeals erred in declining to review, for lack of appellate jurisdiction, the district court's ruling that it had personal jurisdiction over the petitioners.

3. Whether the court of appeals erred in declining to review prior to trial the district court's ruling that in this proceeding it had pendent jurisdiction to hear claims by aliens against Libya under the Alien Tort Act.

Rule 14(1)(b) Statement

The petitioners are: the Socialist People's Libyan Arab Jamahiriya, an independent sovereign state that is recognized by the Government of the United States; the Libyan External Security Organization, a department of the Libyan Government; Libyan Arab Airlines, a Libyan corporation, a majority of whose stock is owned by the Libyan Government.

The names of the 128 respondents are listed in the caption of the court of appeals' decision (App. 1a - 8a).

Rule 29(4)(b) Statement

The United States intervened as a party in the court of appeals pursuant to 28 U.S.C. §§517 and 2403 to defend the constitutionality of the 1996 Amendment to the Foreign Sovereign Immunities Act, 28 U.S.C. §1605(a)(7).

Copies of this petition have been served on the Solicitor General of the United States, Room 5614, Department of Justice, 950 Pennsylvania Avenue, N.W., Washington, D.C. 20530-0001.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit (App. 1a - 36a) is reported at 162 F.3d 748 (1998). The opinion of the United States District Court for the Eastern District of New York (App. 37a - 50a) is reported at 995 F.Supp. 325 (1998).

JURISDICTION

The judgment of the court of appeals was entered on December 15, 1998. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1). The jurisdiction of the district court was invoked under the Foreign Sovereign Immunities Act, 28 U.S.C. §§1330, 1605(a)(7); under federal question jurisdiction, 28 U.S.C. §1331; diversity jurisdiction, 28 U.S.C. §1332; and under the Alien Tort Act, 28 U.S.C. §1350.

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

1. The Fifth Amendment to the Constitution of the United States of America provides in pertinent part:

> No person shall be . . . deprived of . . . liberty, or property, without due process of law;

2. The 1996 Amendment to the Foreign Sovereign Immunities Act of 1976 (Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. 104-132, Title II, §221(a), Apr. 24, 1996, 110 Stat. at 1241), codified in 28 U.S.C. §1605(a)(7), reads in relevant part as follows:

> [§1605. *General exception to the jurisdictional immunity of a foreign state*
>
> (a) a foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case –]
>
> (7) not otherwise covered by paragraph (2), in which money damages are sought against a foreign state for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources (as defined in section 2339A of title 18) for such an act if such act or provision of material support is engaged in by an official, employee, or agent of such foreign state while acting within the scope of his or her office, employment, or agency, except that the court shall decline to hear a claim under this paragraph –
>
> (A) if the foreign state was not designated as a state sponsor of terrorism under section 6(j) of

the Export Administration Act of 1979 (50 U.S.C. App. 2405(j)) or section 620A of the Foreign Assistance Act of 1961 (22 U.S.C. 2371) at the time the act occurred, unless later so designated as a result of such act; and

(B) even if the foreign state is or was so designated, if –

(i) the act occurred in the foreign state against which the claim has been brought and the claimant has not afforded the foreign state a reasonable opportunity to arbitrate the claim in accordance with accepted international rules of arbitration; or

(ii) neither the claimant nor the victim was a national of the United States (as that term is defined in section 101(a)(22) of the Immigration and Nationality Act) when the act upon which the claim is based occurred.

* * * *

(e) For purposes of paragraph (7) of subsection (a)–

(1) the terms "torture" and "extrajudicial killing" have the meaning given those terms in section 3 of the Torture Victim Protection Act of 1991;

(2) the term "hostage taking" has the meaning given that term in Article 1 of the International Convention Against the Taking of Hostages; and

(3) the term "aircraft sabotage" has the meaning given that term in Article 1 of the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation.[1]

(f) No action shall be maintained under subsection (a)(7) unless the action is commenced not later than 10 years after the date on which the cause of action arose. All principles of equitable tolling, including the period during which the foreign state was immune from suit, shall apply in calculating this limitation period.

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[1] Article 1 of the Convention reads as follows:

1. Any person commits an offense if he unlawfully and intentionally:

(a) performs an act of violence against a person on board an aircraft in flight if that act is likely to endanger the safety of that aircraft; or

(b) destroys an aircraft in service or causes damage to such an aircraft which renders it incapable of flight or which is likely to endanger its safety in flight; or

(c) places or causes to be placed on an aircraft in service, by any means whatsoever, a device or substance which is likely to destroy that aircraft, or to cause damage to it which renders it incapable of flight, or to cause damage to it which is likely to endanger its safety in flight; or

(d) destroys or damages air navigation facilities or interferes with their operation, if any such act is likely to endanger the safety of aircraft in flight; or

(e) communicates information which he knows to be false, thereby endangering the safety of an aircraft in flight.

Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation (done at Montreal, September 23, 2971), 24 U.S.T. 564, T.I.A.S. No. 7570.

3. Sec. 6(j) of the Export Administration Act of 1979, 50 U.S.C. App. §2405(j), reads in pertinent part as follows:

(j) Countries supporting international terrorism

(1) A validated license shall be required for the export of goods or technology to a country if the Secretary of State has made the following determinations:

(A) The government of such country has repeatedly provided support for acts of international terrorism.

(B) The export of such goods or technology could make a significant contribution to the military potential of such country, including its military logistics capability, or could enhance the ability of such country to support acts of international terrorism.

(2) The Secretary and the Secretary of State shall notify the Committee on Foreign Affairs of the House of Representatives and the Committee on Banking, Housing, and Urban Affairs and the Committee on Foreign Relations of the Senate at least 30 days before issuing any validated license required by paragraph (1).

(3) Each determination of the Secretary of State under paragraph (1)(A), including each determination in effect on December 12, 1989, shall be published in the Federal Register.

STATEMENT OF THE CASE

A. Introduction

This case arises out of the destruction of an American airliner ("Pan Am flight 103") over Lockerbie, Scotland, on December 21, 1988. The destruction caused the death of all 243 passengers and 16 crew members, as well as 11 persons on the ground. In 1989, survivors and representatives of the decedents brought wrongful death actions against the air carrier, Pan American World Airways, Inc., in several district courts. These suits were consolidated in the Eastern District of New York and have occupied the district court and the Second Circuit for the past decade.[2]

In 1994, numerous survivors and representatives of the victims of the Lockerbie disaster instituted suit in several districts under the Foreign Sovereign Immunities Act ("FSIA") against the Libyan government, Libya's intelligence service, Libya's national commercial airline (collectively "Libya"), and two Libyan nationals.[3] The Second Circuit affirmed the district court's dismissals of these suits for lack of jurisdiction under the FSIA. *Smith v. Socialist People's Libyan Arab Jamahiriya*, 101 F.3d 239 (1996), *cert. denied*, ___ U.S. ___, 117 S.Ct. 1569 (1997).

In 1996, during the pendency of the *Smith* appeal, Congress enacted the amendment to the FSIA in issue here

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[2] *See, In re Air Disaster in Lockerbie, Scot.* 733 F.Supp. 547 (1990), *aff'd*, 928 F.2d 1267 (2d Cir.), *cert. denied*, 502 U.S. 920 (1991); *In re Air Disaster at Lockerbie, Scot.*, 37 F.3d 803 (2d Cir. 1994), *cert. denied, sub nom. Pan American World Airways, Inc. v. Pagnucco*, 513 U.S. 1126 (1995); *Pescatore v. Pan American World Airways, Inc.*, 97 F.3d 1 (2d Cir. 1996).

[3] The two individuals have not been served and have not entered appearances. (App. 40a n.1, 995 F.Supp at 328 n.1).

("FSIA Amendment" or "§1605(a)(7)," reproduced, *supra* at pp. 2-4). The amendment permits suits by U.S. nationals against selected foreign states for damages for personal injury or death caused by an act of torture, summary execution, aircraft sabotage, hostage taking or provision of support or resources for such an act committed outside of the United States. Such suits may be brought only against foreign sovereigns designated by the Secretary of State as "state sponsors of terrorism." Libya is said to have been designated by the Secretary of State under Section 6(j) of the Export Administration Act of 1979 as a "terrorist-supporting" state[4].

Following the enactment of the amendment, the *Smith* plaintiffs and scores of other claimants filed new multi-plaintiff suits against Libya under the FSIA Amendment in several districts, and these suits were once again consolidated in the Eastern District of New York. We summarize below the allegations in the two lead cases.

B. The Factual Allegations

The amended complaint in *Rein v. Socialist People's Libyan Arab Jamahiriya*, No. 96-CV-3803, E.D.N.Y., (J.A.

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[4] In the court below, the United States identified the statutory mandated designation by the Secretary of State as 15 C.F.R. §750.4(b)(6)(i) and stated that Libya was designated as a terrorist state "before the attack on Pan Am Flight 103." Brief for the United States as Intervenor, 2d Cir., No. 98-7467 at 5. The cited C.F.R. section, however, lists only the seven countries said to have been designated as of January 1998; it does not identify when and by whom the designation was made, nor does it give a Federal Register citation as required by Sec. 6(j)(3) of the Export Administration Act, 50 U.S.C. App.

Our search of the Federal Register since the enactment of the Export Administration Act of 1979 has failed to disclose an express determination by the Secretary of State pursuant to Sec. 6(j) of the Act.

at A24-A43[5]) lists in its caption ninety-nine plaintiffs, identified as survivors, executors, administrators or personal representatives of the estates of persons killed while passengers aboard PanAm 103. Libya and its agencies are once again named as defendants. The majority of the plaintiffs and their decedents are United States nationals; an as yet unidentified number of plaintiffs and their decedents are aliens.

The *Rein* complaint alleges that in the early evening of December 21, 1988, Claimants' decedents were passengers on board PanAm Flight 103 ("PanAm 103") on a regularly scheduled flight from London to New York. Shortly after 7:00 p.m., an explosion occurred in the forward baggage compartment of the aircraft causing it to disintegrate in mid-air and to crash to the ground at Lockerbie, Scotland, killing all 243 passengers, 189 of whom were United States nationals, and 16 crew members.

The complaint asserts that the victims' deaths were caused by Libya's willful and deliberate acts of extrajudicial killing and aircraft sabotage and that the explosive device that caused the destruction of the aircraft was purposely placed on board PanAm 103 by individuals in the service, or acting on behalf, of Libya. Since Libya's agents and officials provided material, support and resources to the individuals responsible for the destruction of the plane, Libya is vicariously responsible for its co-defendants' acts because Libya controlled and acted in concert with them.

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[5] "J.A." refers to the Joint Appendix filed by the parties in the Second Circuit, copies of which have been lodged with the Clerk of this Court.

The complaint further alleges that Libya's intelligence service is an independent agency of Libya[6] whose agents and employees were among those directly responsible for the destruction of PanAm 103. The service cooperated with the perpetrators of the crime by supplying them money, labor, intelligence information, equipment and supplies.

Libyan Arab Airlines, too, is claimed to have provided material support and resources to the persons responsible for the destruction of Pan Am 103. The airline's employees and agents provided transportation and materials to the perpetrators, furnished storage facilities, baggage documents, access to airport facilities and baggage handling systems, knowing that such acts would assist the perpetrators in carrying out the destruction of Pan Am 103.

The *Rein* complaint asserts three claims for relief: damages for wrongful death for each claimant and each decedent's estate in the amount of $20-million; survival damages of $1-million for the conscious pain and suffering and fear of impending death suffered by each of the decedents prior to their deaths; and punitive damages of $2-billion against the security organization and the Libyan airline.

The complaint in the second lead action, *Cummock v. Libya*, Case No. 96-CV-2993 (E.D.N.Y.), alleges the same core facts regarding the destruction of Pan Am 103 (*Cummock* 1st amd. compl. J.A. at A67-A91). The jurisdictional allegations and the relief sought in the *Cummock* complaint differ considerably from those in the *Rein* complaint. Thus, the *Cummock* plaintiffs invoke the district court's jurisdiction under the FSIA Amendment, 28 U.S.C. §1330(a), 1605(a)(7),

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[6] Libya informed the district court that the Libyan intelligence service is an organ of the Government of Libya and not a separate legal entity suable in its own name.

under federal question 28 U.S.C. §1331, diversity 28 U.S.C. §1332, Alien Tort Act jurisdiction, 28 U.S.C. §1350, and under the civil remedies provision of the Antiterrorism Act, 18 U.S.C. §2334(b).

Each of the *Cummock* claimants seeks damages against the petitioners jointly and severally in the amount of $20-million for wrongful death under the Antiterrorism Act and the Torture Victim Protection Act; for battery in violation of international laws and treaties; for intentional infliction of emotional distress on the victims and on the survivors of the plane crash; for violation of international law and treaties; $5-million each for loss of consortium on behalf of the surviving spouses; punitive damages of $1-billion against the Libyan External Security Organization and Libyan Arab Airlines; and enforcement of a guaranty said to have been given by Libya to the United Nations to pay any civil judgments that may be entered against the two individual defendants in the future.[7]

C. The Proceedings Below

In July 1997, Libya moved in the district court to dismiss the suits. Libya's motion challenged at the outset the constitutionality of the FSIA Amendment on the ground that the assertion of subject-matter jurisdiction against it violated the principle of separation of powers as well as the Due Process, Bill of Attainder and Ex Post Facto Clauses. Libya also challenged the district court's personal jurisdiction over it due to lack of the constitutionally mandated minimum contacts. Finally, Libya challenged the district court's subject-matter jurisdiction to hear the alien plaintiffs' claims

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[7] The *Cummock* complaint also alleges that the suit is brought on behalf of a class estimated in excess of five hundred members. The district court declined certification of the class.

under the Alien Tort Act because the 1996 Amendment expressly bars suit by aliens, and also because this Court had expressly ruled that the Act does not permit suit against foreign states.

The United States filed a Statement of Interest supporting the constitutionality of §1605(a)(7) and the propriety of the assertion of personal jurisdiction over Libya.[8]

The district court denied Libya's motion in its entirety. It held that Section 1605(a)(7)'s denial of immunity to states designated by the Secretary of State as "state sponsors of terrorism" was constitutional because the Amendment itself and the Secretary's designations were not jurisdictional. In the court's view, subject-matter jurisdiction was based directly on Art. III of the Constitution, and the Secretary's determination merely revived the State Department's traditional practice of advising the courts that a defendant state's claim to sovereign immunity had been denied in a given case. (App. 41a, 995 F.Supp. at 328). The court further held that the FSIA Amendment conferred upon the court discretionary authority to hear cases against states designated as sponsors of terrorism, and that in the instant case he would exercise that discretion. (App. 42a, 995 F.Supp. at 328).

The district court next ruled that under the circumstances of these cases the assertion of personal jurisdiction over Libya was proper and that under the traditional minimum contacts analysis the relevant inquiry was whether Libya had "fair warning" that it may be subject to the jurisdiction of the courts of the United States. (App. 45a, 995 F.Supp. 330). Here, the

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[8] The United States did not comment on whether the alien plaintiffs could assert claims against Libya under the Alien Tort Act on the theory of pendent personal jurisdiction.

plaintiffs claim that Libya aimed its terrorist acts at the United States. The claims arise out of the destruction of an airplane manufactured and registered in the United States, while en route to the United States, with 189 U.S. nationals aboard. Under these circumstances, Libya should have reasonably anticipated that it would be haled into an American court to respond in damages for its tortious acts. (App. 45a, 995 F.Supp. at 330).

The district court next rejected Libya's claim that the FSIA Amendment offended the Ex Post Facto Clause. (App. 48a, 995 F.Supp at 331). In the court's view, that Clause protects only individuals from arbitrary penal sanctions that work unfairly to deprive them of a liberty interest, and is inapplicable to a foreign state's immunity from suit. Moreover, no restrictive penal sanctions are imposed on a foreign state when the United States denies to it sovereign immunity from suit. A retroactive imposition of punitive damages, as permitted by the FSIA, was not before the court. (App. 48a, 995 F.Supp. at 331).

The district court finally concluded that because it had subject-matter and personal jurisdiction over Libya, under the FSIA Amendment, it had pendent jurisdiction over all remaining claims. Among the "remaining claims" are the alien plaintiffs' claims against Libya under the Alien Tort Act for violation of international law. (App. 49a, 995 F.Supp. at 331).

Libya filed a timely appeal, challenging the district court's rulings on subject-matter and personal jurisdiction under the FSIA Amendment, and its subject-matter jurisdiction regarding the alien claimants' Alien Tort Act claims.

The Second Circuit affirmed the district court's ruling upholding the constitutionality of the FSIA Amendment and its competence to hear these suits, although it disapproved the lower court's analysis of the Amendment. (App. 31a-33a, 162 F.3d at 762-63). The appeals court dismissed for lack of appellate jurisdiction all other aspects of Libya's appeal on the authority of *Swint v. Chambers County Comm'n*, 514 U.S. 35 (1995). (App. 21a-22a, 162 F.3d at 758). In the court's view, Libya's challenge of the district court's personal jurisdiction over it raised an issue that was not closely intertwined with the district court's subject-matter jurisdiction and will have to await review until after a trial on the merits. (App. 22a-27a, 162 F.3d at 759-61). Similarly, Libya's liability under the Alien Tort Act and punitive damages raised issues that were not within the "collateral order" exception to the final order rule. (App. 27a-30a, 162 F.3d at 761-62).

REASONS FOR GRANTING THE WRIT

I. Congress' Unprecedented Delegation To Executive Officials Of The Power To Create Federal Court Jurisdiction In Suits Against Foreign States Should Be Reviewed By This Court

The 1996 Amendment seeks to confer subject-matter jurisdiction on federal courts to hear claims against selected foreign states and their agencies for specified international delinquencies committed against nationals of the United States abroad. The Executive Branch is to designate as "state sponsors of terrorism" those states that are denied immunity from suit for causing tortious injury or death. The Amendment is retroactive and requires that suit be brought within ten years after the date on which the claim arose. Any period during which the foreign state was immune from suit tolls the running of the limitation period. Libya is one of seven states so designated.

It is patent that the Executive's political decision branding a foreign state a sponsor of terrorism forms the core of the district courts' subject-matter jurisdiction under the 1996 Amendment.

Libya challenged the FSIA Amendment on the grounds that it violated the doctrine of separation of powers and the principle of non-delegation of legislative powers. No one questions the prerogative of the political branches to label a foreign state with a pejorative in world fora. No one disputes the political branch's authority to impose trade or other sanctions on selected states either unilaterally or in concert with other states. The Amendment, however, goes farther. It politicizes the judiciary in the interest of foreign policy and assigns to the Executive the power selectively to determine the subject-matter jurisdiction of federal courts. Such action is unprecedented; never since the enactment of the First Judiciary Act has Congress attempted to establish the competence of lower federal courts based on purely political and unchallengeable decisions of the Executive Branch.

The district court rejected Libya's challenge ruling Libya's argument was based on a "false premise." In the district court's view, subject matter jurisdiction of federal courts is not bestowed by Congress or the Executive but directly by Article III of the Constitution. (App. 41a, 995 F.Supp. at 328). The district court inexplicably reasoned that in passing the FSIA Amendment Congress conferred discretion on the district courts as to when they should hear cases against foreign states designated as "terrorist." In the court's view, the Amendment "leaves open, *i.e.*, in the discretion of the Court, the power to hear claims against those nations so designated." (App.42a, 995 F.Supp. at 328).

The court of appeals rejected this view of the effect of the Amendment on the jurisdiction of federal courts. (App. 32a

n.12, 162 F.3d at 763 n.12). The court correctly noted that *Verlinden, B.V. v. Central Bank of Nigeria*, 461 U.S. 480 (1983), established firmly that sovereign immunity under the FSIA is a jurisdictional issue, not an affirmative defense and that, therefore, the unconstitutional delegation problem cannot be avoided by the unrealistic reasoning of the district court. (*Ibid.*). The court readily acknowledged that "the power to determine the applicability of the FSIA can indeed be the power to set the jurisdiction of the federal courts." (App. 33a, 162 F.3d at 763 n.14). It concluded, however, that in this case the delegation issue did not arise because at the time §1605(a)(7) was passed, Libya was already on the list of state sponsors of terrorism for purposes of trade sanctions under the Export Administration Act. Hence, "no decision by the Secretary was needed to create jurisdiction over Libya for its alleged role in the destruction of Pan Am 103." (App. 35a-36a, 162 F.3d at 764). In the court's view, the issue of delegation could only be presented by a foreign state that was not on the list of state sponsors of terrorism when §1605(a)(7) was enacted. The court, therefore, rejected Libya's facial challenge to the Amendment.

But the vice of allowing a purely political determination by the political branches of the government to establish the competence of federal courts is the same regardless of when a sovereign state is listed as a "state sponsor of terrorism." It is obvious that the designation delegates a core legislative function - the control of federal court jurisdiction – to the Executive. Congress itself plays no role in making the determination that a given foreign state deserves to be characterized a sponsor of terrorism. Congress has given to the Executive unfettered discretion to decide whether and when to list a foreign state as a sponsor of terrorism. As regards the Judicial Branch, the FSIA Amendment instructs lower federal courts that the designation of a foreign

sovereign as a state sponsor of terrorism renders them competent to sit as an *ad hoc* international court, unilaterally established by the United States, to hear and adjudicate certain international delicts claimed to have been committed by such states against U.S. nationals anywhere in the world. Unlike traditional international tribunals, federal courts are authorized to punish such states by awarding unlimited punitive damages. That this view is not fanciful is illustrated by the experience to date with suits brought under §1605(a)(7) against Iran and Cuba.[9] Such suits are destructive of the U.S. Government's efforts to ease the strained relations between the United States and those states.

The 1996 Amendment has politicized the federal judiciary to an extent unprecedented in the history of the Judicial Branch since the founding of this Republic. The grant of subject-matter jurisdiction to federal courts in Section §1605(a)(7) of the 1996 FSIA Amendment exceeds Congress'

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[9] *See Flatow v. Islamic Republic of Iran*, 999 F.Supp. 1 (D.D.C. 1998) (suit against Iran for alleged support of terrorist groups in West Bank; estate and family members of American student killed in suicide bomber attack by Palestinian terrorist in the Gaza Strip awarded $2.5-mil. compensatory damages; $22.5-mil. solatium; and $225-mil. – comprising three times Iran's estimated annual expenditure for terrorist activities – in punitive damages);

Alejandre v. Republic of Cuba, 996 F.Supp. 1239 (S.D. Fl. 1997) (administrators of three U.S. nationals killed when their private planes were shot down by Cuban Air Force awarded $49.9-mil. in compensatory damages and $137.7-mil. - comprising 3% of the estimated value of Cuban Air Force's MIG fighter fleet - in punitive damages);

Cicippio v. Islamic Republic of Iran, 18 F.Supp. 2d 62 (D.D.C. 1998) (three former hostages in Lebanon brought suit against Iran, alleging that their captors had received financial support from Iran; court awarded compensatory damages to the hostages of $9, $16 and $20-mil., respectively, and to each of their wives $10-mil. for loss of society and companionship).

constitutional authority. Finally, Libya contended both in the district court and in the court of appeals that the Amendment violated the equal protection component of the Fifth Amendment's Due Process Clause. It argued that by use of the term "state sponsor of terrorism", the Congressional scheme impermissibly subjects Libya to liability for punitive damages while insulating non-designated states from such damages. Libya further urged that use of the term "state sponsor of terrorism", as a non-reviewable jurisdictional predicate for suits under §1605(a)(7), violated the evidentiary rule against the impermissible use of character evidence, thus depriving Libya of a fair trial on the merits. The right to a fair trial is a fundamental right under the Fifth Amendment. Thus, to pass constitutional muster, the distinction between "state sponsor[s] of terrorism" and all other states must be shown to further a compelling governmental purpose. The district court, using the rational basis test, rejected this challenge.

The court of appeals did not address the issue due to its dismissal of that part of Libya's appeal for lack of appellate jurisdiction.

In sum, the Amendment violates the principle of separation of powers and deprives Libya of its rights to a fair trial by delegating to the Executive the power to establish the subject matter jurisdiction of federal courts based on transitory political considerations. Whether the 1996 Amendment's conferral of subject matter jurisdiction goes beyond the bounds established by the Constitution should be reviewed by the Court.

II. The Court of Appeals Erred In Holding That The Collateral Order Doctrine Bars Interlocutory Review Of Personal Jurisdiction In An FSIA Suit

The court of appeals was of the view that in suits against foreign states under the FSIA subject-matter and personal jurisdiction present separate issues. (App. 22a-23a, 162 F.3d at 759). The court accurately stated that "Libya's challenge to personal jurisdiction is based on due process and the principle of minimum contacts." (*Ibid.*) It then proceeded to disregard the unique interrelationship in the FSIA between the concepts of "subject-matter" and "personal" jurisdiction, and it misread the holding in *Swint v. Chambers County Comm'n*, 514 U.S. 35 (1995).

Swint, was a civil rights action against three police officers, a municipality and a county commission. The police officers took a collateral appeal to the Eleventh Circuit from the denial of their plea of qualified immunity, in which the county commission joined, seeking review of the district court's denial of its summary judgment motion on liability. The Eleventh Circuit heard both appeals, and this Court reversed.

The Court held that "the Eleventh Circuit's unquestioned authority immediately to review the district court's denial of the police officers' claim of qualified immunity did not include authority to review at once the unrelated question of the County Commission's liability." (514 U.S. at 51). The district court's ruling on the County's potential liability did not qualify as a "collateral order." The Court held that "there is no '*pendent party*' appellate jurisdiction of the kind the Eleventh Circuit purported to exercise." (*Ibid.*, emphasis added).

Swint plainly teaches that a party that itself cannot maintain an interlocutory appeal under the collateral order doctrine may not, under the guise of pendent party appellate jurisdiction, obtain review of an issue unrelated to the issue involved in the collateral appeal. Moreover, the district court's denial of the County Commission's summary judgment motion on liability was not jurisdictional, but was wholly separate and distinct from the court's ruling on the policemen's qualified immunity motions. It is manifest that the issues which the County Commission raised were wholly unrelated to the police officers collateral appeal. Here, the issues of subject-matter and personal jurisdiction are inseparable. Thus, the court of appeals' reliance on *Swint* was wholly misplaced.

The legislative history of the FSIA makes it clear that the issue of subject-matter jurisdiction and personal jurisdiction are inextricably intertwined.[10] Although this Court has not

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[10] Section 1330(b)of the FSIA reads as follows:

> (b) Personal jurisdiction over a foreign state shall exist as to every claim for relief over which the district courts have jurisdiction under subsection (a) where service has been made under section 1608 of this title.

The legislative history of the Act explains this provision thus:

> (b) *Personal Jurisdiction*. Section 1330(b) provides, in effect, a Federal long-arm statute over foreign states (including political subdivisions, agencies, and instrumentalities of foreign states). It is patterned after the long-arm statute Congress enacted for the District of Columbia. Public Law 91-358, sec. 132(a), title I, 84 Stat. 549. The requirements of minimum jurisdictional contacts and adequate notice are embodied in the provision. Cf. *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), and *McGee v. International Life Insurance Co.*, 355 U.S. 220, 223, (1957). For personal

specifically addressed this issue in any of its FSIA decisions to date, all circuits that had occasion to deal with the issue have uniformly held that both subject-matter and personal jurisdiction are inextricably intertwined; both present pure questions of law and are properly reviewed prior to a potentially protracted trial on the merits.[11]

The court of appeals' ruling here is also in conflict with the D.C. Circuit's rulings in *Jungquist v. Sheikh Sultan Bin Khalifa Al Nayhan*, 115 F.3d 1020 (1997) and *Rendall-Speranza v. Nassim*, 107 F.3d 913 (1977). In *Jungquist*, a collateral order appeal was taken from a district court order denying a motion to dismiss a suit under the FSIA against members of the royal house of Abu Dhabi for lack of subject-matter and personal jurisdiction. The D.C. Circuit affirmed the district court's ruling on subject-matter jurisdiction but reversed its ruling on personal jurisdiction and ordered the

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> jurisdiction to exist under section 1330(b), the claim must first of all be one over which the district courts have original jurisdiction under section 1330(a), meaning a claim for which the foreign state is not entitled to immunity. Significantly, each of the immunity provisions in the bill, sections 1605-1607, requires some connection between the lawsuit and the United States . . .

H.R. Rep. 94-1487, 94th Cong., 2d Sess. at 13 (1976).

[11] *See Federal Ins. Co. v. Richard I. Rubin & Co., Inc.*, 12 F.3d, 1270, 1282 (3d Cir. 1993), *cert. denied*, 511 U.S. 1107 (1994); *Stena Rederi AB v. Comision de Contratos del Comite*, 923 F.2d 380, 385 (5th Cir. 1991); *Gould, Inc., v. Pechiney Ugine Kuhlmann*, 853 F.2d 445, 450-51 (6th Cir. 1988); *Rush-Presbyterian-St. Luke's Ctr. v. Hellenic Republic*, 877 F.2d 574, 576 n.2 (7th Cir. 1989); *Compania Mexicana de Aviacion, S.A. v. United States Dist. Court for the Cent. Dist. Of Cal.*, 859 F.2d 1354, 1358 (9th Cir. 1988); *Princz v. Federal Republic of Germany*, 26 F.3d 1166 (D.C. Cir. 1994), *cert.denied*, 115 S.Ct. 923 (1995).

suit dismissed. Adopting the view of leading commentators, the court stated:

> Jurisdiction of the interlocutory appeal is in large measure jurisdiction to deal with all aspects of the case that have been sufficiently illuminated to enable decision by the court of appeals without further trial court development. Any other rule frequently would require wasted litigation without any offsetting advantage in economy of appellate effort or uninterrupted trial court proceedings.

115 F.3d at 1027.

Rendall-Speranza began as a suit by an employee of the International Finance Corporation against her supervisor in which the district court allowed the I.F.C. to be added as a defendant after the statute of limitations had run against it. Thereafter, the I.F.C. appealed the district court's denial of its motion to dismiss for lack of subject-matter jurisdiction under the International Organizations Immunities Act of 1945 and it also raised the limitation issue. The D.C. Circuit exercised pendent appellate jurisdiction over the limitations defense since, if validly raised, the entire action against the I.F.C. could be disposed of on limitations grounds. The court pretermitted the difficult and unresolved question of whether international organizations continued to enjoy absolute immunity from suit under the 1945 Act. Plainly, the limitations issue was wholly divorced from the immunity issue and was not independently appealable, yet it was addressed by the court of appeals in the interest of judicial economy.

The court of appeals' mistaken view of the FSIA's jurisdictional design and the conflict in circuits which its decision has created with respect to the reviewability of FSIA personal jurisdiction conjunctively with subject-matter jurisdiction fully merit review by this Court.

III. The Court of Appeals Erred In Dismissing for Want of Appellate Jurisdiction Libya's Challenge To The Alien Plaintiffs' Claims For Relief Under the Alien Tort Act.

Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 439 (1989) squarely teaches that "the FSIA is the sole basis for obtaining jurisdiction over a foreign state in our courts," to the exclusion of all other jurisdictional bases. The Court there unanimously held that suit will not lie against a foreign state under the Alien Tort Act, 28 U.S.C. §1350. That Act permits suit by aliens only against individuals, and all courts, with the exception of the district court here, have followed the Court's interpretation. In addition, in this case, Congress expressly excluded aliens from suits under the 1996 Amendment against states designated as "sponsors of terrorism". *See* §1605(a)(7)(B)(ii).[12] In this consolidated action, numerous plaintiffs or victims – as yet unidentified – are aliens.[13]

The district court denied that part of Libya's motion seeking dismissal of the alien claimant's suit for lack of

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[12] "[T]he court shall decline to hear a claim under this paragraph [(a)(7)] . . . if . . . neither the claimant nor the victim was a national of the United States (as that term is defined in section 101(a)(2) of the Immigration and Nationality Act) when the act upon which the claim is based occurred."

[13] A multi-plaintiff suit was recently filed in the District Court for the District of Columbia against Libya and consolidated with the instant action in which all plaintiffs are aliens. Plaintiffs seek billions of dollars in compensatory and punitive damages. This filing is said to have been made on the authority of the district court's ruling in this case. *Anderson v. Socialist Peoples' Libyan Arab Jamahiriya*, Case No. 98CV7533 (TCP), (E.D.N.Y.)

subject-matter jurisdiction against Libya under the Alien Tort Act in a curt passage:

> Having established subject-matter and personal jurisdiction over ...[Libya] in this action, the Court also finds that it has pendent jurisdiction to hear all of the plaintiffs' remaining claims . . .

App. 49a, 995 F.Supp. at 331.

Libya's appeal challenged this ruling, but the court of appeals declined to hear the challenge when it dismissed "all other aspects of this interlocutory appeal for want of appellate jurisdiction." (App. 36a, 162 F.3d at 764).

Consequently, the district court's ruling that "pendent jurisdiction" *confers subject-matter jurisdiction against Libya* under the Alien Tort Act has been left standing. The ruling plainly conflicts with the *Amerada Hess* Court's express holding and merits review by this Court.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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